Nagalingam a/l P Vellupillay v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–99 OF 2011
ABDUL WAHAB PATAIL, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
17 DECEMBER 2014

Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking — Accused arrested by police when he came out of room in house where dangerous drugs and paraphernalia for their packaging were found — Whether accused's contention he did not have exclusive possession of drugs an acceptable defence — Whether allegation others had access to house a red herring — Whether evidence showed accused used room to store and package drugs for trafficking

A police party which raided a house intending to arrest the appellant ('the accused') in connection with a murder case instead found him coming out of a room which had strewn on the floor packages containing dangerous drugs and paraphernalia used to repack them for sale. The police party, led by 'PW5', found the house unlocked and when they entered it PW5 saw the accused coming out of a room holding a transparent plastic packet. PW5 seized the packet suspecting it to contain dangerous drugs. The packet was later confirmed by the chemist to contain 14.84g of methamphetamine. When the police party entered the room the accused had come out from, they found several plastic bags containing suspected dangerous drugs, equipment for sealing of plastic bags, a weigh balance and a package of empty transparent plastic packets. The drugs which were found in the room comprised 196.47g of heroin and 57.5g of monoacetylmorphines. The accused was arrested and charged with trafficking in the heroin and monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 and for possession of the methamphetamine under s 12(2) of the same Act. He was convicted and sentenced for the offences after trial. The High Court held that the accused had mens rea possession of all the drugs. As for the drugs found in the room, the manner in which they were packed and the existence of paraphernalia used to weigh, pack and seal the drugs created the inference the accused was trafficking in the drugs. In his defence, the accused denied he had exclusive possession of the drugs because the house was also accessible to his wife ('SD2') and one 'Ah Soon' (to whom he had allegedly subtenanted the room which contained the drugs). The High Court concluded that 'Ah Soon' was a fictitious character created to exculpate the accused from the charges. The court also viewed SD2's evidence, which corroborated her husband's testimony, with caution as she was an interested witness and was wholly dependent on the accused for financial support. In the instant appeal against conviction and sentence, the accused

rehashed the argument that since the house was accessible to others, he had raised a reasonable doubt in respect of exclusive custody and control of the drugs. The accused also said the prosecution failed to prove he had knowledge of the existence of the drugs in the room.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The fact of non-exclusive possession did not negate guilt. Even if the submission that the accused did not have exclusive access and control because his wife also had access was accepted, it only meant they both had joint possession. The trial court had considered the defence and held that based on the evidence the accused's wife and his two step-children were not staying at the premises at the time of the police raid as none of their personal belongings were found in the house. There was no evidence SD2 had access at the material time to the room let alone to the substances containing the dangerous drugs. The contention that she had access to the drugs was purely speculative (see paras 25–26).

(2) That the drugs were found in different bags and packages did not mean they were found in such different locations as would necessitate separate scrutiny and appreciation. The different bags and packages containing the heroin and monoacetylmorphines were all in the same room. The bags and packages together with paraphernalia for weighing and packaging were on the floor of the room upon which there was a specific finding, not appealed against, that it was used as a storage place by the accused. As found by SP5, the drugs and other materials were in plain view when he entered the room the accused had immediately before come out from. Though the drugs in the room were different from the drugs the accused was found holding, they were common drugs being trafficked (see paras 7 & 17).

(3) The quantity of drugs found was inconsistent with possession for personal consumption. The materials for weighing, packaging and sealing of plastic packets pointed to no other object but to traffic in the drugs. The fact that while the accused was the tenant of the room, neither he nor his wife and step-children had any personal effects there underlined the fact the room was used at the material time as a storage and packaging location for the purpose of trafficking in the drugs (see para 27).

[Bahasa Malaysia summary

Sepasukan polis menyerbu rumah dengan niat untuk menangkap perayu ('tertuduh') yang mempunyai hubungan dengan kes pembunuhan tetapi sebaliknya menemuinya yang keluar dari bilik yang mana di atas lantai bertaburan paket-paket mengandungi dadah berbahaya dan peralatan yang digunakan untuk membungkus ia semula untuk jualan. Pasukan polis tersebut

yang diketuai oleh 'PW5', mendapati rumah tidak dikunci dan apabila mereka masuk PW5 nampak tertuduh keluar dari bilik memegang paket plastik lutsinar. PW5 merampas paket mencurigainya mengandungi dadah berbahaya. Paket tersebut kemudiannya disahkan oleh ahli kimia mengandungi dadah methamphetamine seberat 14.84g. Apbila pasukan polis memasuki bilik yang tertuduh keluar darinya, mereka mendapati beberapa beg plastik mengandungi dadah berbahaya yang dicurigai, peralatan untuk merekatkan bag plastik, penimbang berat dan bungkusan paket plastik lutsinar yang kosong. Dadah yang diperolehi dalam bilik terdiri daripada 196.47g heroin dan 57.5g of monoacetylmorphines. Tertuduh ditangkap dan dituduh mengedar heroin dan monoacetylmorphines di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan untuk milikan methamphetamine di bawah s 12(2) Akta yang sama. Dia disabitkan dan dihukum untuk kesalahan selepas perbicaraan. Mahkamah Tinggi memutuskan bahawa tertuduh mempunyai mens rea milikan terhadap kesemua dadah tersebut. Bagi dadah yang diperolehi di dalam bilik, cara di mana ia dibungkus dan kewujudan peralatan untuk menimbang, membungkus dan merekat dadah membentuk inferens tertuduh mengedar dadah tersebut. Dalam pembelaannya, tertuduh menafikan yang dia mempunyai milikan ekslusif dadah kerana rumah juga boleh dimasuki oleh isterinya ('SD2') dan seorang 'Ah Soon' (yang dia dakwa menyewa bilik yang mengandungi dadah tersebut). Mahkamah Tinggi memutuskan bahawa 'Ah Soon' adalah watak yang direka untuk membebaskan tertuduh daripada dakwaan. Mahkamah juga menimbang keterangan SD2, yang menyokong keterangan suaminya, dengan berhati-hati kerana dia adalah saksi yang berkepentingan dan bergantung keseluruhannya ke atas tertuduh untuk sokongan kewangan. Dalam rayuan ini terhadap sabitan dan hukuman, tertuduh mengolah semula hujahan bahawa memandangkan rumah boleh dimasuki oleh orang lain, dia telah membangkitkan keraguan munasabah berkaitan jagaan dan kawalan eksklusif dadah tersebut. Tertuduh juga menyatakan pihak pendakwaan gagal untuk membuktikan dia mempunyai pengetahuan mengenai kewujudan dadah di dalam bilik tersebut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Fakta milikan tidak eksklusif tidak menyangkal kebersalahan. Walaupun penghujahan bahawa tertuduh tidak mempunyai akses dan kawalan eksklusif kerana isterinya juga mempunyai akses diterima, ia hanya bermaksud kedua-dua mereka mempunyai milikan bersama. Mahkamah perbicaraan telah mempertimbangkan pembelaan dan memutuskan bahawa berdasarkan atas keterangan isteri tertuduh dan kedua-dua anak tirinya tidak tinggal di premis pada masa serbuan polis kerana barang-barang peribadi mereka tidak dijumpai di dalam rumah tersebut. Tidak terdapat keterangan SD2 mempunyai akses pada masa material kepada bilik tersebut juga kepada bahan yang mengandungi dadah berbahaya tersebut. Hujahan yang dia mempunyai akses kepada dadah

tersebut adalah semata-mata spekulatif (lihat perenggan 25–26).

(2) Bahawa dadah tersebut dijumpai dalam beg-beg dan bungkusan berlainan tidak bermaksud ia dijumpai di lokasi yang berlainan seperti untuk memerlukan penilaian dan penelitian berbeza. Beg-beg dan bungkusan berlainan tersebut mengandungi heroin dan monoacetylmorphines kesemuanya dalam bilik yang sama. Beg-beg dan bungkusan bersama dengan peralatan untuk menimbang dan membungkus terletak atas lantai bilik di mana ia terdapat dapatan yang spesifik, yang tidak dirayu terhadapnya, yang ia digunakan sebagai tempat penyimpan oleh tertuduh. Seperti yang diperolehi oleh SP5, dadah tersebut dan barangan yang lain adalah dalam penghilatan yang jelas apabila dia memasuki bilik tersebut tertuduh yang sebelumnya keluar dari situ. Walaupun dadah di dalam bilik tersebut adalah berlainan daripada dadah yang dijumpai tertuduh memegangnya, ia adalah dadah biasa yang diedarkan (lihat perenggan 7 & 17).

(3) Kuantiti dadah yang didapati tidak konsisten dengan milikan bagi penggunaan peribadi. Barang-barang untuk menimbang, membungkus dan merekat paket plastik menunjukkan bukan kepada objek lain tetapi untuk mengedar dadah tersebut. Fakta bahawa sementara tertuduh adalah penyewa bilik tersebut, bukan dia atau isterinya dan anak-anak tirinya mempunyai apa-apa kesan peribadi menunjukkan fakta bilik digunakan pada masa material sebagai tempat pembungkusan dan penyimpanan bagi tujuan mengedar dadah tersebut (lihat perenggan 27).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Cases referred to

Choo Yoke Choy v PP [1992] 2 MLJ 632; [1992] 4 CLJ 179, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Tan Tatt Eek & Other Appeals [2005] 2 MLJ 685, FC (refd)
Romi Amora bin Amir v PP [2011] 4 MLJ 571; [2011] 1 CLJ 870, CA (distd)
Yap Chin Chai v PP [2011] 2 MLJ 632, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 39A(B), 39B(1)(a), s 39B(2)

Appeal from: Criminal Trial No 45–45 of 2010 (High Court, Kuala Lumpur)

J Kuldeep Kumar (J Kuldeep Kumar & Co) for the appellant.

Aslinda Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA:

[1] The accused Nagalingam a/l P Vellupillay ('the appellant') appealed against his conviction and sentence for:

(a) trafficking in dangerous drugs involving a total of 253.97g (196.47g of heroin and 57.5g of monoacetylmorphines); and

(b) unauthorised possession of 14.84g of methamphetamine,

offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the Dangerous Drugs Act 1952 and s 12(2) of the Dangerous Drugs Act punishable under s 39A(B) of the Dangerous Drugs Act respectively.

[2] This court dismissed the appeals and affirmed the conviction and sentence.

THE PROSECUTION CASE

[3] Briefly, the prosecution case was that on 2 February 2010 at about 3am, Insp Mohd Azri bin Mat Yussof ('PW5') led a police party to conduct a raid at a house bearing the address No 6784A, Jalan Langkawi, Tai On Garden, Batu 4, Gombak, Kuala Lumpur, in respect of another offence. Upon arrival, PW5 found the front grill and wooden doors opened and the key to the front wooden door in the key hole of the lock at the centre of the door knob of the wooden door. While proceeding to enter the house with two of his men, PW5 saw the appellant coming out from a room located near the toilet. Introducing himself as a police officer, he saw that the appellant was holding a transparent plastic packet (P22) in his left hand. Seizing the packet, PW5 found that it contained a substance he suspected to be a dangerous drug. The packet was later found to contain 14.84g of methamphetamine, the subject of the second charge.

[4] It is also the prosecution case that upon entering the room that the appellant came out from, PW5 found:

(a) a yellow coloured plastic bag, P24, on the floor ('the yellow bag') inside of which were:

  (i) three transparent plastic bags P25 (1–3) containing a pink coloured substance suspected to be a dangerous drug;

  (ii) one big transparent plastic bag ('the one big bag') P27 containing a

green coloured substance suspected to be a dangerous drug; and

(iii) one small transparent plastic bag ('the one small bag') containing 80 packets P29 (1–80) in eight bundles containing pills suspected to be a dangerous drug,

(b) a black and white coloured paper bag, next to the yellow coloured plastic bag P24 above, bearing the brand 'Quiksilver' ('the paper bag') inside of which were found two red coloured plastic bags, P32 and P34, inside each of which were a newspaper package P32A and P34A containing a pink coloured substance suspected to be a dangerous drug;

(c) three more plastic bags, P36, P38 and P40, on the floor, wrapped in newspapers, P36A, P38A and P40A, inside of each of which were plastic bags containing a big transparent plastic bag, P36B, P38B and P40B, each containing a substance which PW5 suspected to be heroin; and

(d) on the floor in the same room apparatus for sealing plastic bags ('the sealer'), P15, a balance, P16 and a package of empty transparent plastic packets, PI7.

[5] PW5 issued a search list P19 to the appellant, detailing out the seized items and the location where they were situated at the time of their seizure.

THE GROUNDS OF APPEAL

[6] The grounds of appeal were that:

(a) the drugs were in two locations but the High Court made one finding; and

(b) the High Court failed to consider the evidence that since SD2, the wife of the appellant, had access to the drugs, a reasonable doubt had been raised in respect of exclusive custody and control.

DRUGS IN TWO LOCATIONS

[7] That the drugs were found in different bags and packages does not mean they were found in such different locations as would necessitate separate scrutiny and appreciation. The different bags and packages were in the same room. The substances in the bags and packages in the room were heroin and monoacetylmorphines as charged. There is nothing demonstrated of the difference in nature or circumstances as to require separate scrutiny and appreciation.

[8] If any drug was in a different location, it was the methamphetamine in the bag the appellant was found holding. For this drug, he was separately charged under the second charge, and which was addressed by the High Court.

[9] That aside, the two grounds are interlinked and we address the two grounds together.

[10] The submission began with trite law as to the physical and mental elements of possession (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337; *Public Prosecutor v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685) before coming to the submission that:

> ... It is our contention that the learned trial judge misdirected herself to consider both drug offences together in respect of the element of mens rea.

[11] Counsel relied upon *Yap Chin Chai v Public Prosecutor* [2011] 2 MLJ 632 to submit:

> The learned trial judge had inferred knowledge of the drugs found in the room based on the fact that the complainant saw the appellant coming out from the room where the drugs were found and the appellant was holding a packet of drugs in his right hand. The learned trial judge did not separately consider as to whether the appellant had known the existence and content of the bags inside the room. The conduct of the appellant by holding the packet of drugs and coming out from the fourth room cannot be inferred that the appellant has knowledge of the drugs in the bedroom. There was a serious misdirection by the learned trial judge.

[12] The High Court had, in the prosecution case, found in respect of:

(a) the second charge (pp 13–14 of grounds of judgement):

> From the evidence which was given by the prosecution witnesses as set-out, briefly, above, the court found that the prosecution had proved on a prima facie basis that the accused was found in physical possession of the packet containing the 14.84g of methamphetamine, the subject matter of the second count, as he was holding it in his left hand when he was confronted by PW5 at 3am on 2 February 2010 at the house which was rented by him from PW3. The accused clearly had custody and control of the packet.
>
> The court was also satisfied that the accused had mens rea possession of the drugs inside the packet because the packet was transparent. Therefore, the accused could see easily the contents of the packet which he was holding in his hand. Since the accused was holding the packet of drugs in his right hand and was walking out of a room of the 1st floor which he had rented from PW3 during the wee hour of the morning, the court drew the irresistible inference that the accused had manifested an intention to deal with the packet of drugs as if the packet of drugs belonged to him. The court was also satisfied that the irresistible conclusion was that the accused had knowledge that the packet

A contained dangerous drugs and that he had gone to the house to take the packet of drugs in the early hours of the morning in order to avoid detection of his illegal activities by his neighbours and also the police.

B **[13]** The thrust of the submissions in the appeal is in respect of the first charge where the High Court held (pp 14–17 of grounds of judgment):

That also explained why the accused did not even bother to lock the grill door with a padlock and the front wooden door from inside the house as he would have reasonably assumed that no one would go to the premises at the material time.

C It was also inherently likely and probable that the accused must also have been in a hurry to get the packet of drugs from inside the premises and to leave the premises quickly as he had left the house keys hanging outside the house with one of the keys still stuck to the knob of the front wooden door and both the doors open to facilitate his speedy exit. He certainly did not expect the police to conduct the raid on the premises at that time.

D According to the complainant, he had stumbled upon the accused and the drugs in his raid on the house because he had led the police party to carry out an arrest on the accused in connection with another case, ie a murder case, and not based on information concerning the presence of drugs in the house.

E As for the large quantity of drugs which formed the subject matter of the first charge, the court was satisfied that he also had mens rea possession of the drugs because they were found inside the room from where the complainant had seen the accused coming out earlier. The drugs could be easily seen by the complainant after he had opened up the plastic bags and the same would have applied to the accused.

F There were also drugs already packed into several smaller transparent plastic packets and tied up with rubber bands. Packed in that manner it could not be said that the drugs were for his consumption. The only inference to be made by the court is that they were for sale and distribution to consumers of the drugs. There were also paraphernalia used to weigh, package and seal the drugs such as the balance, the sealer and the transparent empty plastic packets. The only inference which the court

G could make was that the accused was trafficking in the substantial quantity of drugs at the material time within the meaning of the word 'trafficking' as defined in s 2 of the DDA and that he was conveniently using that room in the first floor which he had rented for his drug trafficking activities since his wife and child were staying elsewhere.

H ...

The court, therefore, ordered the accused to make his defence to the two counts in order for him to rebut the prosecution case and the presumption of 'trafficking' on the balance of probabilities and also to explain the prosecution case failing which the court would find him guilty, convict him and impose the sentences as provided

I in the two sections on him (see the cases of *Public Prosecutor v Yuvarai* [1969] 2 MLJ 89 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393).

[14] The passage of the grounds of judgement taken to task is at p 3 of the grounds of judgement where under the subject of mens rea possession, the

High Court stated:

> Since the first ingredient of both the two counts, ie the accused was found in mens rea possession of the dangerous drugs is common to both the counts, the court shall deal with the first ingredient in relation to both the counts.

[15] Relying upon *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632; [1992] 4 CLJ 179 (SC). it was submitted that since there are three people who had access to the said house namely the appellant himself, his wife ('SD2' Thenmoly a/p Satiyel) and the person whom the appellant subrented the house, Ah Soon, it was a misdirection for the High Court to deal with possession of the substance in the package found in the appellant's hands together with the substances the subject of the first charge found in the room. Driving home the point, it was submitted:

> The question put to the Appellant was whether the drugs in the 4th bedroom belonged to the Appellant. The prosecution failed to prove that he knew there were drugs inside the 4th room. The prosecution did not put any question to the SP5 as to whether the Appellant could have seen the plastic bags as SP5 was the first person who entered the house.
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> My Lords, there was a misdirection by the learned Trial Judge on the finding that the Appellant have the mens rea without evidence that he could have seen the presence of the drugs or he could have known the content of the plastic bags.

[16] In *Romi Amora bin Amir v Public Prosecutor* [2011] 4 MLJ 571; [2011] 1 CLJ 870, it was held that because the prosecution had failed to establish that the appellant knew the package was under his seat, it would naturally follow that he would not know the contents. That case concerned a package containing cannabis found under the driver's seat of the taxi the appellant drove and came out from. It was a small amount. It could possibly be placed or inserted by any passenger sitting in the rear passenger seat. Witness PW3 testified that he rented the taxi from the owner, and the appellant had borrowed the car from him. He further testified he did not find any plastic bag inside the taxi when it was sent for cleaning at the car wash centre.

[17] In the instant case, the yellow coloured plastic bag, the black and white paper bag and the three plastic bags, P36, P38 and P40, together with paraphernalia for weighing and packaging were on the floor of the room upon which there was a specific finding not appealed against that it was used as a storage place by the appellant. As found by SP5, it was in plain view on the right when he entered the room the appellant had immediately before came out from. Though the drugs were different from the drugs he was found holding, they are common drugs being trafficked. Also not appealed against were the findings that:

> The accused's wife gave evidence which was consistent with and corroborated the evidence of the accused. She said that the accused had sublet the premises to a male

Chinese. She had met the male Chinese two to three times at the premises prior to the accused subletting the premises to him but she did not know the name of the male Chinese.

The court noted that the accused's wife was present in the court room while the prosecution witnesses were giving evidence against the accused. Since she was only aged 30 years old at the time she testified in court in the Tamil language and she is a Malaysian citizen it would be reasonable to infer that she would be able to understand simple Malay which was used by the prosecution witnesses in their oral testimonies.

The prosecution witnesses had testified in Malay concerning the police raid at the premises and the detention and arrest of the accused at the material time with the incriminating plastic packet in his hand and the recovery by the police of the newspaper and plastic packages containing dangerous drugs.

...

The court noted that the accused's wife had tried very hard to give evidence which was consistent with the accused's evidence. Although she was a competent witness to testify for the defence, the court had to evaluate her evidence with great care and caution bearing in mind that she was also an interested witness being the wife of the accused and that she, a full time housewife, and her two step-children were wholly dependent on the accused for financial support.

The accused's wife also sought to raise a doubt that the dangerous drugs could have belonged to the accused's older brother who was residing in the fourth room which was situated nearest to the kitchen before the premises were sublet to Ah Soon.

However, the court rejected the accused's defence that he had sublet the premises to Ah Soon, that he had gone to the premises after receiving a phone call from Ah Soon, that he did not know that the contents of the packet which he was holding in his hand and the contents of the newspaper and plastic packages which the complainant recovered from inside the fourth room were dangerous drugs and that the dangerous drugs did not belong to him but to Ah Soon.

The reason is because the court was satisfied that Ah Soon was a fictitious person, that the existence of Ah Soon was deliberately concocted by the accused and his wife to exculpate him from the two counts preferred against him. Furthermore, the accused did not give any reason to the court why Ah Soon would wish to frame him in that manner knowing that the accused would be sentenced to death if the accused was found guilty and was convicted by the court.

[18] For the foregoing reasons, we find *Romi Amora bin Amir v Public Prosecutor* [2011] 4 MLJ 571; [2011] 1 CLJ 870 distinguishable.

[19] We observe that in the cross-examination to a question put to him, SP5 replied (RR1:48)

(Rujuk P6). Tak setuju kesemua barang-barang ini tidak dijumpai dalam bilik.

[20] In his testimony on oath, the appellant said he went to the premises

after Ah Soon called him. He testified:

> Apabila sampai saya nampak pintu rumah terbuka. Saya pun masuk dan cari Ah Soon. Saya panggil dia. Saya terus pergi ke bilik No. 4 yang saya sewa kepada dia. Saya pergi ke tandas dan cari dia. Dia tidak ada. Saya dapat 1 bungkus di lantai di lorong. Saya pun ambil dan terus ke ruang tetamu. Tiba-tiba ada banyak orang yang ada di depan pintu.

[21] He did not say the plastic and paper packages of substances containing the dangerous drugs were not there. Instead, in cross-examination, he said (RR1:132):

> Tak setuju dadah yang dijumpai dalam bilik ialah kepunyaan saya dan bukan kepunyaan Ah Soon.

[22] The crux of the defence is that the appellant did not have sole custody and control of the room in which the drugs were found. It was submitted that the High Court erred when it failed to accept that because SD2, Thenmoly a/p Satiyel, the wife of the appellant, had access to the drugs, a reasonable doubt had been established.

[23] From the foregoing, the finding was a finding of fact on the evidence.

[24] Furthermore, the relevance of exclusive access and control of a premise or room pertains to proof that he had possession of things found in the room. Whether he has possession of the things in the room is always a finding to be made upon the particular facts and circumstances. That another has access to the room does not mean he cannot be held to be in possession of the drugs found in the room if such access is only, for example, in his presence. The idea of exclusivity was explained in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 (FC), where the Federal Court held:

> [16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession …', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.
>
> [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53:

> ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[18] Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself, he cited the following definition in *Stephen's Digest* (9th Ed, p 304), in which the exclusive element mentioned by Taylor J appears:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[25] Thus, that fact of non-exclusive possession does not negate guilt. Even if the submission that the appellant did not have exclusive access and control because his wife also had access were accepted, it would only mean on the facts of this case that they both had joint possession. The High Court considered the defence that the appellant's wife, SD2 had access and held:

> The court also believed and accepted the evidence of PW2 that he had taken the plumber to the premises to repair the plumbing upon a complaint lodged by the accused and he had seen the accused in the premises. PW2 did not see the accused's wife and step children in the premises.
>
> The police also did not find any personal belongings of the accused's wife and two step children in the premises. Hence the accused's version that they had stayed with him in the premises before they had moved to their present address could not and might not have been reasonably true. It was more likely that if they were staying there it was in the month of October as testified by PW3.
>
> Be that as it may, at the time of the police raid at the premises the accused's wife and his two step children were not residing in the premises. The photographs taken at the premises showed that the kitchen was devoid of any kitchen equipment, cooking utensils, crockery and cutlery.

[26] There was no evidence of access at the material time to the room let alone the substances containing the dangerous drugs by SD2. Her access to the drugs is purely speculative.

OTHER OBSERVATIONS

[27] We observe that the quantity of drugs is inconsistent with possession for the purpose of consumption. The paraphernalia for weighing, packaging and sealing in plastic packets point to no other object but to traffic in the substance containing the dangerous drugs. The fact that while the appellant was the tenant of the room, neither he nor his wife and step-children had any clothes and personal effects there underlines that the room was maintained at the material time as a storage and packaging location for the purpose of trafficking in the substances found therein. We find no error in the High Court holding:

> The court was of the view that the accused had rented the premises to engage in his drug trafficking activities unknown to PW2 and PW3. The court did not believe the accused that he was working as a security guard at the material time. If he was working as a security guard he would not have been able to afford to pay the rental for the premises which he had rented from PW3 and also the rental for the premises occupied by his wife and his two step-children in Hot Spring, Setapak. Therefore, the court was satisfied that he had concocted the character of Ah Soon in order to shift the culpability for the drugs to Ah Soon and to show that Ah Soon was paying a monthly sum of RM600 to him as rental for the premises.

[28] We, therefore, dismissed the appeals and affirm the conviction and sentence on both charges.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar